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6 **UNITED STATES DISTRICT COURT**  
7 **SOUTHERN DISTRICT OF CALIFORNIA**

8 SCOTT MARQUETTE, an individual,  
9 Plaintiff,  
10 vs.

CASE NO. 13cv2719-WQH-  
JMA

ORDER

11 BANK OF AMERICA, N.A, f/k/a  
12 Countrywide Home Loans, Inc., an  
13 entity of unknown form; FEDERAL  
14 HOME LOAN MORTGAGE  
15 CORPORATION S/A-3 DAY ARC-  
16 125949, an entity of unknown form;  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.;  
and DOES 1-10, inclusive,  
Defendants.

17 HAYES, Judge:

18 The matter before the Court is the Motion to Dismiss Plaintiff's Complaint filed  
19 by all Defendants. (ECF No. 9).

20 **I. Background**

21 On November 12, 2013, Plaintiff Scott Marquette initiated this action by filing  
22 a Complaint in this Court. (ECF No. 1). On March 3, 2014, Defendants Bank of  
23 America, N.A. ("Bank of America"), Federal Home Loan Mortgage Corporation S/A-3  
24 day ARC-125949 ("Freddie Mac"), and Mortgage Electronic Registration Systems, Inc.  
25 ("MERS") filed the Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss"),  
26 accompanied by a Request for Judicial Notice. (ECF No. 9). On March 17, 2014,  
27 Plaintiff filed an opposition. (ECF No. 11). On March 24, 2014, Defendants filed a  
28 reply. (ECF No. 12).

## II. Allegations of the Complaint

On May 24, 2007, Plaintiff entered into two loan transactions to refinance his principal residence located at 2625 Pirineos Way, #228, Carlsbad, California 92009, by signing two promissory notes payable to Mortgage Investors Group, the originating lender. The first promissory note in the amount of \$324,000.00 was secured by a first deed of trust against Plaintiff's residence (the "First Loan"). The second promissory note in the amount of \$72,000.00 was secured by a second deed of trust against Plaintiff's residence (the "Second Loan"). The funds from the transactions were used to pay off the existing mortgages secured by Plaintiff's residence.

On May 24, 2007, Plaintiff met with a notary public and a mortgage broker at the mortgage broker's office in Encinitas, California. The mortgage broker had Plaintiff sign numerous documents related to the loan transactions at issue. All documents signed by Plaintiff were taken by the mortgage broker, and the mortgage broker then handed Plaintiff another packet of documents and told Plaintiff that the packet contained copies of the documents that Plaintiff had just signed. However, the packet of documents handed to Plaintiff were not exact copies of the documents that Plaintiff had signed, and instead, contained three copies of a Notice of Right To Cancel for each loan with incorrect dates for the "date of the transaction" and blank lines for the date of expiration of the right to cancel.

Shortly after Plaintiff consummated the transactions, servicing for both the First Loan and Second Loan were transferred to Countrywide Home Loans, Inc., which later became known as Bank of America. In 2010, Bank of America identified Freddie Mac as the assignee/owner of the First Loan. Bank of America never identified the assignee/owner of the Second Loan.

On March 28, 2009, Plaintiff mailed a Rescission Notice pursuant to 15 U.S.C. § 1635 and a Qualified Written Request pursuant to 12 U.S.C. §2605 to Countrywide Home Loans, Inc. and Mortgage Investors Group. Bank of America has failed to respond to the Rescission Notice and Qualified Written Request in the manner required

1 by law.

2 On March 11, 2010, to allow time for the parties to explore settlement options  
3 and negotiations, Plaintiff and Defendants entered into a written Tolling Agreement.

4 On July 23, 2012, Plaintiff received notice from Bank of America that the Second Loan  
5 was forgiven “as a result of the Department of Justice and State Attorneys General  
6 global settlement with major mortgage services, including Bank of America, N.A.” *Id.*

7 ¶ 20. On October 8, 2013, Bank of America and Freddie Mac gave notice of  
8 termination of the Tolling Agreement as of November 13, 2013. Plaintiff filed the  
9 Complaint on November 12, 2013, prior to the expiration of the Tolling Agreement.

10 The Complaint asserts three causes of action: (1) violation of the Truth in  
11 Lending Act (“TILA”), 15 U.S.C. §§ 1601, *et seq.*, against Freddie Mac and MERS; (2)  
12 violation of the California Rosenthal Act, Cal Civ. Code §§ 1788, *et seq.*, against Bank  
13 of America; and (3) violation of the Real Estate Settlement Procedures Act (“RESPA”),  
14 12 U.S.C. § 2601, *et seq.*, against Bank of America. The Complaint seeks damages,  
15 rescission of the First Loan pursuant to TILA, injunctive relief, declaratory relief, and  
16 attorney’s fees.

### 17 **III. Standard of Review**

18 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state  
19 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “A pleading that  
20 states a claim for relief must contain ... a short and plain statement of the claim showing  
21 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under Rule  
22 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient  
23 facts to support a cognizable legal theory. *See Balistreri v. Pac. Police Depot*, 901 F.2d  
24 696, 699 (9th Cir. 1990).

25 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
26 requires more than labels and conclusions, and a formulaic recitation of the elements  
27 of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
28 (quoting Fed. R. Civ. P. 8(a)). “To survive a motion to dismiss, a complaint must

1 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
2 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,  
3 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
4 content that allows the court to draw the reasonable inference that the defendant is liable  
5 for the misconduct alleged.” *Id.* (citation omitted). “[T]he tenet that a court must  
6 accept as true all of the allegations contained in a complaint is inapplicable to legal  
7 conclusions. Threadbare recitals of the elements of a cause of action, supported by  
8 mere conclusory statements, do not suffice.” *Id.* (citation omitted). “When there are  
9 well-pleaded factual allegations, a court should assume their veracity and then  
10 determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 679.

#### 11 **IV. Discussion**

##### 12 **A. TILA**

13 Defendants contend that the TILA claim must be dismissed because the claim is  
14 insufficiently pled for the following reasons: the allegations are conclusory; rescission  
15 is not available on the loan transactions at issue; the claim fails to allege that  
16 Defendants had any involvement in the origination of Plaintiff’s loan; and the claim  
17 fails to plead detrimental reliance, as required to plead entitlement to TILA damages.  
18 Defendants also contend that the TILA rescission claim should be dismissed because  
19 Plaintiff does not allege a credible tender of the borrowed funds as required for  
20 rescission, and Plaintiff waived his right to rescission under TILA. Defendants request  
21 that the TILA claim for rescission and damages be dismissed with prejudice.

22 Plaintiff contends that the TILA claim is adequately pled; rescission is available  
23 for the loan transactions at issue; Plaintiff’s obligation to tender has not arisen and the  
24 Complaint adequately alleges tender; and state law waiver principles do not apply to  
25 Plaintiff’s claim for rescission under TILA. Plaintiff requests leave to amend if the  
26 TILA claim is dismissed.

27 The Complaint alleges two counts in support of the first cause of action for  
28 violation of TILA against Freddie Mac and MERS. Count one alleges that the First

1 Loan was subject to Plaintiff's right of rescission, as described by 15 U.S.C. § 1635 and  
 2 Regulation Z, 12 C.F.R. § 226.23. Count one alleges that Plaintiff did not receive all  
 3 required material disclosures, which gave Plaintiff a continuing right to rescind the First  
 4 Loan for up to three years after consummation of the transaction. Count one further  
 5 alleges that Plaintiff timely exercised his option to rescind the First Loan on March 28,  
 6 2009. Count two of the TILA cause of action seeks damages for Freddie Mac's and  
 7 MERS' alleged failure to comply with TILA's rescission provisions in response to  
 8 Plaintiff's March 28, 2009 rescission notice.

9 "TILA and Reg[ulation] Z contain detailed disclosure requirements for consumer  
 10 loans. A lender's violation of TILA allows the borrower to rescind a consumer loan  
 11 secured by the borrower's primary dwelling." *Semar v. Platte Valley Fed. Sav. & Loan*  
 12 *Ass'n*, 791 F.2d 699, 703 (9th Cir. 1986) (citing 15 U.S.C. § 1635(a)). "Reg Z makes  
 13 clear that failure to fill in the expiration date of the rescission form is a violation of the  
 14 TILA." *Id.* (quotation omitted). The omission of the expiration date, "though a purely  
 15 technical violation of TILA," entitles the consumer "to rescind the loan agreement for  
 16 up to three years, without regard to whether the omission was material." *Id.* (citations  
 17 omitted). However, certain transactions are excluded from the right to rescission,  
 18 including "a transaction which constitutes a refinancing ... of the principal balance then  
 19 due ... by the same creditor secured by an interest in the same property." 15 U.S.C. §  
 20 1635(e)(2); *see also* 12 C.F.R. § 226.23(f)(2) ("The right to rescind does not apply to  
 21 ... [a] refinancing ... by the same creditor of an extension of credit already secured by  
 22 the consumer's principal dwelling.").

23 The Complaint alleges: "On May 24, 2007, Plaintiff entered into two consumer  
 24 credit transactions ... to refinance his *principal dwelling/residence* ... by signing two  
 25 promissory notes payable to Mortgage Investors Group, the *originating lender*." (ECF  
 26 No. 1 ¶ 10 (emphasis added)). The Complaint fails to allege sufficient facts to show  
 27 that the right to rescission applies to the loan transactions at issue. *See* 12 C.F.R. §  
 28 226.23(f)(2); *cf. Obenchain v. Wells Fargo Bank, N.A.*, No. 2:10-CV-2304-MCE, 2011

1 WL 775878, at \*2 (E.D. Cal. Feb. 28, 2011) (“Regulation Z interprets section 1635 and  
2 excludes refinance transactions from rescission under TILA that are ‘by the same  
3 creditor of an extension of credit already secured by the consumer’s principal dwelling.’  
4 However, refinance transactions are not excluded to the extent that ‘the new amount  
5 financed exceeds the unpaid principal balance, any earned unpaid finance charge on the  
6 existing debt, and amounts attributed solely to the costs of the refinancing or  
7 consolidation.’ As a result, borrowers are entitled to rescind only to the extent that the  
8 refinance involves new money.”) (quoting 12 C.F.R. § 226.23(f)(2)). The Motion to  
9 Dismiss the TILA claim for rescission is granted.

10 The Complaint’s TILA claim for damages is predicated entirely on Freddie  
11 Mac’s and MERS’ “failure ... to comply with the rescission provisions of the TILA and  
12 Reg Z.” (ECF No. ¶ 35). As discussed above, the Complaint does not adequately  
13 allege that the rescission provisions of TILA and Regulation Z apply to the transactions  
14 at issue. Even if the Complaint adequately alleged a violation of TILA which might  
15 give rise to damages in this case, “in order to receive actual damages for a TILA  
16 violation, i.e., an amount awarded to a complainant to compensate for a proven injury  
17 or loss, a borrower must establish detrimental reliance.” *In re Smith*, 289 F.3d 1155,  
18 1157 (9th Cir. 2002) (“Without any evidence in the record to show that Smith would  
19 either have secured a better interest rate elsewhere, or foregone the loan completely, her  
20 argument must fail—she presents no proof of any detrimental reliance, i.e., any actual  
21 damage.”) (quotation omitted). The Complaint fails to allege adequate facts to show  
22 detrimental reliance on any applicable TILA violation. The Motion to Dismiss the  
23 TILA claim for damages is granted.

#### 24 **B. RESPA**

25 Defendants contend that the Complaint fails to adequately allege that his March  
26 28, 2009 Qualified Written Request satisfies the statutory criteria for a qualified written  
27 request. Defendants also contend that the Complaint fails to allege actual damages from  
28 Bank of America’s alleged failure to respond to the March 28, 2009 Qualified Written

1 Request. Plaintiff contends that the Complaint adequately alleges a RESPA violation,  
2 including that the March 28, 2009 Qualified Written Request satisfied the statutory  
3 requirements and that Plaintiff suffered damages in the form of emotional distress.

4 The Complaint alleges that Bank of America violated RESPA by failing to  
5 adequately respond to Plaintiff's March 28, 2009 Qualified Written Request. "If any  
6 servicer of a federally related mortgage loan receives a qualified written request from  
7 the borrower (or an agent of the borrower) for information relating to the servicing of  
8 such loan, the servicer shall provide a written response acknowledging receipt of the  
9 correspondence within 20 days ... unless the action requested is taken within such  
10 period." 12 U.S.C. § 2605(e)(1)(A). Section 2605 specifies the contents of a proper  
11 Qualified Written Request and the required response to a borrower's Qualified Written  
12 Request. If a loan servicer fails to comply with the provisions of 12 U.S.C. § 2605, a  
13 borrower is entitled to "any actual damages to the borrower as a result of the failure"  
14 and "any additional damages, as the court may allow, in the case of a pattern or practice  
15 of noncompliance with the requirements of [12 U.S.C. § 2605]." 12 U.S.C. §  
16 2605(f)(1).

17 "Numerous courts have read Section 2605 as requiring a showing of pecuniary  
18 damages to state a claim." *Molina v. Wash. Mut. Bank*, No. 09-CV-894, 2010 WL  
19 431439, at \*7 (S.D. Cal. Jan. 29, 2010). "This pleading requirement has the effect of  
20 limiting the cause of action to circumstances in which plaintiff can show that a failure  
21 to respond or give notice has caused them actual harm." *Shepherd v. Am. Home Mortg.*  
22 *Servs., Inc.*, No. 2:09-1916, 2009 WL 4505925, at \*3 (E.D. Cal. Nov. 20, 2009)  
23 (citation omitted). A plaintiff is entitled to recover for the loss that relates to the  
24 RESPA violation, not for all losses related to foreclosure activity. *See Lal v. Am. Home*  
25 *Servicing, Inc.*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010) ("[T]he loss alleged must  
26 be related to the RESPA violation itself."); *Torres v. Wells Fargo Home Mortg., Inc.*,  
27 No. 10-4761, 2011 WL 11506, at \*8 (N.D. Cal. Jan. 4, 2011) ("The plaintiff must ...  
28 allege a causal relationship between the alleged damages and the RESPA violation.").



1 The Complaint alleges that Plaintiff suffered “emotional distress.” (ECF No. 1  
 2 at 26). The Complaint fails to allege facts plausibly suggestive of a causal connection  
 3 between the alleged RESPA violation and the emotional distress. *See Obot v. Wells*  
 4 *Fargo Bank, N.A.*, No. C11-566-HRL, 2011 WL 5243773, at \*3 (N.D. Cal. Nov. 2,  
 5 2011) (“The Ninth Circuit has not decided whether emotional distress can constitute  
 6 ‘actual damages’ for purposes of § 2605(f), and cases are split. But even assuming,  
 7 without deciding, that plaintiff properly could claim damages for emotional distress  
 8 under RESPA, the FAC fails to sufficiently allege a causal link here.... A conclusory  
 9 allegation of emotional distress, without more, is insufficient to state a claim.”)  
 10 (collecting cases). The Motion to Dismiss the RESPA claim is granted.

### 11 **C. Supplemental Jurisdiction**

12 The Complaint’s remaining cause of action asserts a violation of California’s  
 13 Rosenthal Act. The Complaint does not allege that this Court has diversity jurisdiction;  
 14 the Complaint alleges that this Court has supplemental jurisdiction over the state law  
 15 claim. (ECF No. 1 ¶ 2).

16 The federal supplemental jurisdiction statute provides: “[I]n any civil action of  
 17 which the district courts have original jurisdiction, the district courts shall have  
 18 supplemental jurisdiction over all other claims that are so related to claims in the action  
 19 within such original jurisdiction that they form part of the same case or controversy  
 20 under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). A district  
 21 court may decline to exercise supplemental jurisdiction over a state law claim if:

- 22 (1) the claim raises a novel or complex issue of State law,
- 23 (2) the claim substantially predominates over the claim or claims over  
 24 which the district court has original jurisdiction
- 25 (3) the district court has dismissed all claims over which it has original  
 jurisdiction, or
- 26 (4) in exceptional circumstances, there are other compelling reasons for  
 27 declining jurisdiction.

28 28 U.S.C. § 1367(c). Having dismissed the federal claims asserted by Plaintiff against  
 all Defendants, the Court declines to exercise supplemental jurisdiction over the state




1 law claim pursuant to 28 U.S.C. § 1367(c). *See San Pedro Hotel Co., Inc. v. City of Los*  
2 *Angeles*, 159 F.3d 470, 478 (9th Cir. 1998).

3 **V. Conclusion**

4 IT IS HEREBY ORDERED that the Motion to Dismiss is GRANTED. (ECF No.  
5 9). The Complaint is DISMISSED without prejudice. No later than thirty (30) days  
6 from the date this Order is filed, Plaintiff may file a motion for leave to amend the  
7 Complaint, accompanied by a proposed first amended complaint.

8 DATED: July 30, 2014

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10 **WILLIAM Q. HAYES**  
11 United States District Judge  
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